Supreme Court, U.S.
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In The

Supreme Court of the United States

BARBARA SNOW ERLIN, as Representative of the Estate of Darrow K. Erlin,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether false imprisonment under 28 U.S.C. § 2680(h) should be defined under federal law and not the law of any state so as to allow petitioner's claim under the Federal Tort Claims Act.

Whether employees of the Federal Bureau of Prisons, who are granted the power to make arrests under 18 U.S.C. § 3050, are law enforcement officers under 28 U.S.C. § 2680(h) of the Federal Tort Claims Act.

Whether "investigative or law enforcement officer" conduct as defined in 28 U.S.C. § 2680(h) of the Federal Tort Claims Act includes only conduct in the course of a search, seizure, or arrest.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Barbara Snow-Erlin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1-8 and 19-30) are reported at 470 F.3d 804 and 364 F.3d 1127. The opinions of the district court (App., *infra*, 9-18 and 31-34) are unreported.

JURISDICTION

The court of appeals entered its judgment on November 14, 2006 (App., *infra*, 1). A timely petition for rehearing was denied on January 23, 2007 (App., *infra*, 35). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3050 provides, in pertinent part:

> An officer or employee of the Bureau of Prisons may –
>
> (1) make arrests on or off of Bureau of Prisons property without warrant for violations of

> the following provisions regardless of where the violation may occur: sections 111 (assaulting officers), 751 (escape), and 752 (assisting escape) of title 18, United States Code, and section 1826(c) (escape) of title 28, United States Code;
>
> (2) make arrests on Bureau of Prisons premises or reservation land of a penal, detention, or correctional facility without warrant for violations occurring thereon of the following provisions: sections 661 (theft), 1361 (depredation of property), 1363 (destruction of property), 1791 (contraband), 1792 (mutiny and riot), and 1793 (trespass) of title 18, United States Code; and
>
> (3) arrest without warrant for any other offense described in title 18 or 21 of the United States Code, if committed on the premises or reservation of a penal or correctional facility of the Bureau of Prisons if necessary to safeguard security, good order, or government property;
>
> if such officer or employee has reasonable grounds to believe that the arrested person is guilty of such offense, and if there is likelihood of such person's escaping before an arrest warrant can be obtained. If the arrested person is a fugitive from custody, such prisoner shall be returned to custody. . . .

28 U.S.C. § 1346(b)(1) provides:

> Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing

on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2674 provides, in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. . . .

28 U.S.C. § 2680 provides, in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to –
>
> > (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purposes of this subsection, "investigative or law enforcement officer" means any officer of the United States who

is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

STATEMENT OF THE CASE

After winning his release from federal prison through a petition for writ of habeas corpus, Darrow Kierov Erlin sued the United States under the Federal Tort Claims Act to recover damages for 311 days he wrongfully spent in custody. The district court had jurisdiction under 28 U.S.C. § 1346(b)(1) (tort claims against the United States). The district court initially dismissed on limitations grounds, and the court of appeals reversed. During the pendency of the first appeal, Erlin died, and his wife was substituted as representative of his Estate. On remand, the district court again dismissed the action, this time for lack of subject matter jurisdiction, holding that the claim for negligent miscalculation of Erlin's parole date amounted to a claim for false imprisonment, and was barred by 28 U.S.C. § 2680(h). Although confronted with the issue in the petition for rehearing, the court of appeals failed to address the exception to the law enforcement provision for officials empowered to make arrests for violations of federal law.

The relevant facts are not disputed as stated by the court of appeals. (App., *infra*, 2). Erlin was convicted on federal drug charges in Nevada in 1984, and sentenced to three years' imprisonment, two-and-one-half years of it suspended, plus five years' probation. In 1988, Erlin was convicted again on federal drug charges, this time in California, and sentenced to ten years' imprisonment, plus eight years of supervised release. Because of the 1988

conviction, the Nevada court reinstated its initial three-year sentence, and the Bureau of Prisons determined his release date by aggregating the two sentences into a thirteen-year term of imprisonment. In 1995, Erlin was released from prison. In 1996, he was arrested for driving under the influence of alcohol. As a result of the 1996 arrest and his failure to report it to his parole officer, the California court revoked Erlin's supervised release for the second drug conviction and sentenced him to six months' imprisonment. In addition, the Parole Commission revoked Erlin's parole and sentenced him to twenty additional months of imprisonment.

In 1997, Erlin successfully challenged the jurisdiction of the Parole Commission in a habeas petition filed in the Central District of California. That court ruled that the period of parole should have been limited to the initial three-year (1984) sentence, not the aggregated thirteen-year prison term, because the Sentencing Reform Act of 1984 rendered the 1988 sentence non-parolable. Therefore, the court concluded, Erlin's parole had expired by the time of his 1996 arrest, and the Parole Commission had no jurisdiction to impose any additional term of imprisonment. The United States did not appeal the grant of Erlin's habeas petition. The Bureau of Prisons released Erlin.

The gravamen of Erlin's complaint, now pursued by his widow, is that he spent 311 days in federal custody, from December 28, 1996, to November 7, 1997, in violation of his rights based on the negligence of government officials.

REASONS FOR GRANTING THE PETITION

The Decision of the Court of Appeals is Erroneous Because the Court Did Not Follow Supreme Court Precedent to Interpret Section 2680(h) and thus, Unduly Broadened Section 2680(h)'s Scope Barring Petitioner's FTCA Claim.

This Court and the Courts of Appeal have held that the excluded torts of § 2680(h) are defined according to federal common law. *United States v. Neustadt*, 366 U.S. 696, 705-06 (1961); *Stepp v. United States*, 207 F.2d 909, 911 (4th Cir. 1953), *cert. denied*, 347 U.S. 933 (1954). The district court erred in this respect by defining false imprisonment under state law. (App., *infra*, 15) ("Under California law, the tort of false imprisonment can be committed by negligent as well as intentional conduct"). The decision of the court of appeals is silent about what methodology must be employed to define the excluded torts of § 2680(h), but the court had to adopt some definition of false imprisonment to bar the petitioner's claim. (App., *infra*, 8) (holding that petitioner's claim arose out of false imprisonment). Both the court of appeals' and the district court's definition of false imprisonment was too broad. If false imprisonment for the purposes of § 2680(h) is properly defined according to Supreme Court precedent, it is clear that there is no false imprisonment anywhere in the petitioner's claim and it cannot be barred by § 2680(h). Thus, the opinion of the court of appeals affirming dismissal is inconsistent with Supreme Court precedent.

The error lies in the lower courts' confusion of two similar yet distinct issues. The district court correctly stated that "the liability of the government in an FTCA action is determined under the law of the state in which the act or omission occurred." (App., *infra*, 15). This is

clear from 28 U.S.C. § 1346(b)(1) and 28 U.S.C. § 2674 of the FTCA. But these statutes only speak to the liability of the United States under the FTCA's general waiver of sovereign immunity, not to the applicability of specific exceptions to that waiver, which are encapsulated in a separate statutory provision, 28 U.S.C. § 2680. This Court has explicitly pointed out this difference, stating:

> "[w]hether or not this analysis accords with the law of States which have seen fit to allow recovery under analogous circumstances, it does not meet the question of whether this claim is outside the intended scope of the Federal Tort Claims Act, which depends solely upon what Congress meant by the language it used in section 2680(h)."

United States v. Neustadt, 366 U.S. 696, 705-06 (1961).

The district court, confusing different sections of the FTCA, defined false imprisonment according to state law, instead of federal common law. This was a substantive error by the district court. The court of appeals committed a similar error by not actively defining false imprisonment according to Supreme Court authority. If this Court's methodology to define false imprisonment is followed, petitioner's claim clearly does not "arise out of" false imprisonment and cannot be barred by § 2680(h).

According to Supreme Court authority, the correct method to define false imprisonment for the purposes of § 2680(h) is to find the "traditional and commonly understood legal definition of" false imprisonment when Congress enacted the FTCA in 1946. *Neustadt*, 366 U.S. at 707. In *Neustadt*, this Court relied on several treatises, including the American Law Institute's *Restatement (First)*

of Torts and *Prosser on Torts*, to find the "traditional and commonly understood legal definition" of the tort of misrepresentation for the purposes of § 2680(h). *Neustadt*, 366 U.S. at 706, n.16. The Supreme Court stated that these treatises "clearly, if not conclusively" provided the definitions of the torts as used by § 2680(h). *Neustadt*, 366 U.S. at 706.

Erlin's incarceration, which gives rise to petitioner's damages, facially appears to be false imprisonment. Thus, it could be interpreted that the petitioner's negligence claim "arises out of" that purported false imprisonment. But if the *Neustadt* methodology is followed and the "traditional and commonly understood legal definition" of false imprisonment is applied, it is clear that Erlin's incarceration by the BOP is not false imprisonment for the purposes of § 2680(h). The treatises are clear: at common law, confinement by a valid legal process is not false imprisonment.[1] Thus, false imprisonment under § 2680(h)

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[1] The First Restatement of Torts pertinently states:

> "At common law, the appropriate form of action for imposing a confinement was trespass for false imprisonment *except where the confinement was by arrest under a valid process* issued by a court having jurisdiction . . . a *confinement otherwise than by arrest under a valid process* is customarily called false imprisonment."

The *Restatement (First) of Torts* § 35, comment (a) (1934) (emphasis added).

Prosser on Torts states the same proposition:

> "The distinction between [false imprisonment and malicious prosecution] lies in the existence of valid legal authority for the restraint imposed . . . The weight of modern authority is that *where the defendant has attempted to comply with legal requirements . . . false imprisonment will not lie*, and the remedy is malicious prosecution."

(Continued on following page)

does not encompass confinement that was a product of a valid legal process.

Erlin was confined by a valid legal process. It is undisputed that Erlin was confined to prison due to the order of a court in the Northern District of California for violation of his supervised release. (App., *infra*, 2-3) (describing the undisputed events that led to Erlin's confinement). In excluding petitioner's claim under § 2680(h), the court of appeals deemed Erlin's confinement to be false imprisonment.

Since Erlin's confinement was a direct result of a valid legal process, it is not false imprisonment in the context of § 2680(h). Thus, petitioner's claim does not "arise out of" false imprisonment because there is no false imprisonment in the petitioner's claim. In this way, the court of appeals committed a jurisdictional error when it concluded that the "Plaintiff's claim arises out of false imprisonment and thus is barred by 28 U.S.C. § 2680(h)." (App., *infra*, 8). This Court should grant this petition to correct this jurisdictional error.

The Decision of the Court of Appeals is Erroneous Because the Court Did Not Follow the Explicit Statutory Provisions of Section 2680(h) which Does Not Bar Claims "Arising Out of" Intentional Torts Committed by "Law Enforcement Officers."

The opinion of the court of appeals, in barring the petitioner's claim, is inconsistent with the explicit statutory language of the Federal Tort Claims Act. Section

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William L. Prosser, PROSSER ON TORTS 74-75 (1941 ed.) (emphasis added).

2680(h) generally bars all FTCA claims "arising out of . . . false imprisonment" and other intentional torts. But, the statute continues:

> "with regard to acts or omissions of investigative or *law enforcement officers* of the United States Government, . . . [the FTCA] *shall apply to any claim arising out of . . . false imprisonment*" (emphasis added). This proviso is an exception to the general exception of 2680(h). The United States may be liable for intentional torts like false imprisonment if they are committed by "law enforcement officers." Section 2680(h) goes on to define "law enforcement officer" as "any officer of the United States who is empowered by law . . . to make arrests for violations of Federal law."

28 U.S.C. § 2680(h).

Erlin was imprisoned by "law enforcement officers." It is undisputed that Erlin was incarcerated by officials of the Bureau of Prisons (BOP) for violations of his supervised release and parole. (App., *infra*, 3) (following the grant of Erlin's habeas petition,[2] "[t]he Bureau of Prisons released Erlin."). Evidence submitted by the government in support of its motion for summary judgment confirms that BOP officials were responsible for the incorrect calculation of Erlin's sentence which the Central District Court found to be erroneous (Stating BOP responsible for "calculating inmate sentence computations"; Erlin's "sentence computation [was] performed by the Bureau of

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[2] Erlin's habeas petition was granted by the Central District of California, not the Northern District as stated by the court of appeals in its second reported decision of this case. (Compare App., *infra*, 3, 10-11, 21-22, 32).

Prisons"). Because the court of appeals characterized Erlin's incarceration as false imprisonment, it should also have applied the statue that makes BOP officials "law enforcement officers." BOP officers and employees have statutory power to arrest for violations of federal law under 18 U.S.C. § 3050.

Since BOP officials are clearly "law enforcement officers" who have the power to arrest, the court of appeals should not have barred plaintiff's claim under the explicit statutory provisions of § 2680(h). This Court should grant this petition to correct this jurisdictional error.

The Decision of the Court of Appeals is Erroneous Because the Court, *Sub Silentio*, applied an Erroneous Definition of "Law Enforcement Officer" under Section 2680(h).

By failing to address in explicit terms the scope of the law enforcement officer provision as applied to this matter, the court of appeals leaves its decision open to an interpretation that is at odds with the majority of the federal courts to have addressed the issue. While there is no longer a true circuit split on this issue, this Court should take this opportunity to clarify the scope of the law enforcement officer definition in § 2680(h).

The two reported court of appeals decisions that have construed this provision are in conflict. In *Pooler v. United States*, 787 F.2d 868, 871 (3d Cir.), *cert. denied*, 479 U.S. 849 (1986) the court held that § 2680(h) addresses only "conduct in the course of a search, seizure, or arrest." That court relied more extensively on the discretionary function exception in § 2680(a), and held that the two plaintiffs had

not alleged that a federal officer had committed an intentional tort in the course of a search, seizure, or arrest.

The court of appeals for the District of Columbia performed a more careful analysis of the law enforcement provision in an earlier case, but that decision has been abrogated by a subsequent decision of this Court. *Sami v. United States*, 617 F.2d 755, 764-65 (D.C. Cir. 1979), *abrogated on other grounds*, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The court of appeals in *Sami* examined the legislative history of the law enforcement proviso, concluding that Congress intended "to provide a remedy against the Federal Government for innocent victims of Federal law enforcement abuses." 617 F.2d at 764 (quoting S.Rep. No. 588, 93rd Cong., 1st Sess. 4 (1973). "We find no indication that [the provision] was not meant to cover the situation where law enforcement officers are assigned to duties that do not involve their actual participation in making arrests or conducting investigations." 617 F.2d at 764. The court noted that its interpretation gave effect to the plain meaning of the words in the statute. *Id.* The federal district courts have largely followed this interpretation, and have rejected that of the Third Circuit in *Pooler*. See, e.g., *Ortiz v. Pearson*, 88 F.Supp.2d 151, 164-65 (S.D.N.Y. 2000); *Employers Ins. Of Wausau v. United States*, 815 F.Supp. 255 (N.D. Ill. 1993); *Harris v. United States*, 677 F.Supp. 403, 405 (W.D.N.C. 1988); *Crow v. United States*, 659 F.Supp. 556, 570-71 (D. Kan. 1987). But see, *Murphy v. United States*, 121 F.Supp.2d 21, 24-25 (D.D.C. 2000) (suggesting *Sami* and *Wausau* decisions actually apply a "middle ground," and dismissing claim where officer was not engaged in traditionally understood investigative or law enforcement activities).

The court of appeals' published decision under review fails to explain why it failed to apply the proviso of 28 U.S.C. § 2680(h) to employees of the Bureau of Prisons who are granted explicit statutory authority to make arrests. The case can thus be cited as in harmony with *Pooler*, and at odds with the majority of reported decisions treating this subsection of the Federal Tort Claims Act. This Court can clarify the scope of this provision and correct the erroneous judgment of the court of appeals by granting this petition.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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470 F.3d 804

United States Court of Appeals, Ninth Circuit.

Barbara SNOW-ERLIN, as representative of the Estate of Darrow K. Erlin, Plaintiff-Appellant,

v.

UNITED STATES of America, Defendant-Appellee.

No. 05-16790.

Argued and Submitted Oct. 16, 2006.
Filed Nov. 14, 2006.
Amended Dec. 6, 2006.

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Claire T. Cormier, Assistant United States Attorney, San Jose, CA, for the defendant-appellee.

Appeal from the United States District Court for the Northern District of California; Vaughn R. Walker, District Judge, Presiding. D.C. No. CV-99-04050-VRW.

Before SUSAN P. GRABER, M. MARGARET McKEOWN, and RICHARD C. TALLMAN, Circuit Judges.

AMENDING OPINION AND AMENDED OPINION

GRABER, Circuit Judge.

ORDER

The opinion filed on November 14, 2006, is amended as follows:

On slip opinion page 18546, line 2 from the bottom, insert "as we said of another tort," after "Plaintiff has no claim – "

On slip opinion page 18546, footnote 1, line 7, delete "of" after "question".

Petitions for rehearing or petitions for rehearing en banc will remain due 45 days from the November 14, 2006, filed date of the opinion.

OPINION

Plaintiff Barbara Snow-Erlin sued the United States under the Federal Tort Claims Act ("FTCA") for damages resulting from an allegedly negligent miscalculation of her late husband's release date from parole. The district court dismissed the action for lack of subject matter jurisdiction, holding that the negligence claim amounted to a claim for false imprisonment, which is barred by 28 U.S.C. § 2680(h). We affirm.

FACTUAL AND PROCEDURAL HISTORY

The relevant facts are not disputed. In 1984, Darrow Erlin was convicted of conspiracy to manufacture and attempt to manufacture methaqualone, and the District Court for the District of Nevada sentenced him to three years' imprisonment, two-and-one-half years of it suspended, plus five years' probation. In 1988, Erlin was convicted of possessing cocaine with intent to distribute, and the District Court for the Northern District of California sentenced him to 10 years' imprisonment, plus eight years of supervised release. Because of the 1988 conviction, the Nevada court reinstated Erlin's three-year

methaqualone sentence, and the Bureau of Prisons properly determined his release date by aggregating the two sentences into a 13-year term of imprisonment. In 1995, Erlin was released from prison. In 1996, he was arrested for driving under the influence of alcohol. As a result of the 1996 arrest and his failure to report it to his parole officer, the court in the Northern District of California revoked Erlin's supervised release for his cocaine conviction and sentenced him to six months' imprisonment. In addition, the Parole Commission revoked Erlin's parole and sentenced him to 20 additional months of imprisonment.

In 1997, Erlin successfully challenged the jurisdiction of the Parole Commission in a habeas petition filed in the Northern District of California. That court ruled that the period of parole should have been limited to the three-year methaqualone sentence, not the aggregated 13-year term of imprisonment, because the Sentencing Reform Act of 1984 rendered the cocaine sentence non-parolable. Therefore, the court concluded, Erlin's parole had expired by the time of his 1996 arrest, and the Parole Commission had no jurisdiction to impose any additional term of imprisonment. The United States did not appeal that decision. The Bureau of Prisons released Erlin.

In 1999, Erlin filed suit against the United States "for personal injury resulting from the negligent incarceration of plaintiff by the government's employees." The complaint alleged that Erlin "spent three hundred-eleven (311) days in Federal custody, from December 28, 1996 to November 7, 1997, in violation of his rights pursuant to the negligent acts and omissions of the defendant." Thus, "Defendants were negligent and breached their duty to plaintiff by negligently and wrongfully seizing and incarcerating him. Defendants erroneously determined plaintiff's parole

expiration date and failed to use due care by keeping plaintiff in custody where there existed no lawful justification for detaining plaintiff against his will."

In 2002, Erlin died. His widow, Barbara Snow-Erlin, pursues the claim on his estate's behalf.

This case is before us for the second time. Previously, we reversed the district court's dismissal of the action on statute-of-limitations grounds. We held that a cause of action for miscalculating a release date does not accrue until a prisoner establishes that he is legally entitled to release from custody. *Erlin v. United States,* 364 F.3d 1127, 1133 (9th Cir.2004). On remand, the district court dismissed the action for lack of subject matter jurisdiction, holding that the claim is, in essence, one for false imprisonment and thus is barred by 28 U.S.C. § 2680(h). Plaintiff timely appeals.

STANDARD OF REVIEW

We review de novo a district court's compliance with our mandate. *United States v. Kellington,* 217 F.3d 1084, 1092 (9th Cir.2000). We also review de novo a district court's order dismissing a case for lack of subject matter jurisdiction. *Hacienda Valley Mobile Estates v. City of Morgan Hill,* 353 F.3d 651, 654 (9th Cir.2003).

DISCUSSION

A. *The district court did not run afoul of the "law of the case" doctrine.*

Plaintiff first asserts that our earlier opinion in this case, *Erlin,* 364 F.3d 1127, already decided that the claim sounds in negligence. From that premise, Plaintiff argues

that the law of the case doctrine forbade the district court on remand from examining the nature of the claim and characterizing it as one for false imprisonment. We disagree; Plaintiff construes our prior opinion too broadly.

"Law of the case is a jurisprudential doctrine under which an appellate court does not reconsider matters resolved on a prior appeal." *Jeffries v. Wood,* 114 F.3d 1484, 1488-89 (9th Cir.1997) (en banc), *overruled on other grounds by Lindh v. Murphy,* 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). For the sake of efficiency and consistency, a "'decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case.'" *Id.* at 1489 (quoting *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.),* 77 F.3d 278, 281 (9th Cir.1996)). Of course, for the law of the case doctrine to apply, we must actually have decided the matter, explicitly or by necessary implication, in our previous disposition. *Milgard Tempering, Inc. v. Selas Corp. of Am.,* 902 F.2d 703, 715 (9th Cir.1990). "'[O]n remand, courts are often confronted with issues that were never considered by the remanding court.' In such cases, 'broadly speaking, mandates require respect for what the higher court decided, not for what it did not decide.'" *Kellington,* 217 F.3d at 1093 (quoting *Biggins v. Hazen Paper Co.,* 111 F.3d 205, 209 (1st Cir.1997)).

Here, our prior decision dealt solely with the issue of accrual of a cause of action. The opening paragraph of the opinion delineates its scope: "This is a statute of limitations case. The issue is when a cause of action accrued for purposes of the statute of limitations under the Federal Tort Claims Act." *Erlin,* 364 F.3d at 1129. We observed that Plaintiff's claim "is not for false imprisonment. It is for negligence." *Id.* at 1133. But that passage was a

"description[] rather than [a] disposition[] of [Plaintiff's] claim[]." *Rebel Oil Co. v. Atl. Richfield Co.*, 146 F.3d 1088, 1094 (9th Cir.1998). We took the claim *as alleged* on the face of the complaint in order to determine the applicability of *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), and in order to decide solely the underlying statute of limitations question.

The issue of jurisdiction under the FTCA was not before us at that time. The district court's opinion did not decide the issue, nor did the parties' briefs to this court raise it. "[A court] is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38, 73 S.Ct. 67, 97 L.Ed. 54 (1952); *Bassiri v. Xerox Corp.*, 463 F.3d 927, 933 n. 3 (9th Cir.2006).

We thus hold that the district court did not run afoul of the "law of the case" doctrine when it examined subject matter jurisdiction under the FTCA.

B. *The district court correctly held that it lacks subject matter jurisdiction.*

Plaintiff argues that the action may go forward under the FTCA because the complaint alleges negligence. Again, we disagree.

The FTCA waives the United States' sovereign immunity for certain torts, 28 U.S.C. §§ 1346(b)(1), 2674, but the statute excepts "[a]ny claim arising out of . . . false imprisonment" from its waiver of immunity, *id.* § 2680(h). Whether a claim for negligent miscalculation of a release date arises out of false imprisonment for purposes of the

FTCA is a question of first impression for this court and, so far as we can determine, for any federal appellate court.

Although Plaintiff couches her claim in terms of negligence, "[t]his circuit looks beyond the labels used to determine whether a proposed claim is barred [under § 2680(h)]." *Thomas-Lazear v. FBI,* 851 F.2d 1202, 1207 (9th Cir.1988). "[W]e look beyond [the party's] characterization to the conduct on which the claim is based." *Mt. Homes, Inc. v. United States,* 912 F.2d 352, 356 (9th Cir.1990); *see also Klein v. United States,* 268 F.2d 63, 64 (2d Cir.1959) (per curiam) (examining the conduct behind a claim of negligence); *Sopp v. United States,* 373 F.2d 795, 796 (3d Cir.1966) (per curiam) (same); *Gaudet v. United States,* 517 F.2d 1034, 1035 (5th Cir.1975) (per curiam) (same); *Metz v. United States,* 788 F.2d 1528, 1534 (11th Cir.1986) (same). If the gravamen of Plaintiff's complaint is a claim for an excluded tort under § 2680(h), then the claim is barred. *See Sheehan,* 896 F.2d at 1171 ("Regardless of the plaintiff's characterization of the cause of action, § 2680(h) bars suit for claims based on conduct which constitutes one of the excepted torts. . . ."). To "hold otherwise would permit evasion of the substance of [§ 2680(h)'s] exclusion of liability." *Id.* Examining the substance of Plaintiff's complaint, the gravamen of the complaint is a claim for false imprisonment.

The only harm alleged is that the United States kept Erlin imprisoned for 311 days too long.[1] Independent of

[1] At oral argument, counsel asserted that the government's negligence also resulted in a separate type of harm, to wit, extra time on parole *before* Erlin was imprisoned, during which time some of his liberties were curtailed. We decline to consider this theory because it finds no basis in the complaint as filed and is raised for the first time on

(Continued on following page)

that alleged false imprisonment, Plaintiff has no claim – as we said of another tort, "the Government's actions that constitute a claim for slander are essential to [Plaintiff's] claim for negligen[ce]." *Thomas-Lazear,* 851 F.2d at 1207. Plaintiff cannot sidestep the FTCA's exclusion of false imprisonment claims by suing for the damage of false imprisonment under the label of negligence. *See id.* at 1206 (disapproving "an effort to remove the damage element from an intentional tort barred by section 2680(h) and plead it separately as negligen[ce]"); *see also Sheehan,* 896 F.2d at 1173 (requiring independence from the excluded tort) (citing *Block v. Neal,* 460 U.S. 289, 296-99, 103 S.Ct. 1089, 75 L.Ed.2d 67 (1983)).

In summary, we hold that Plaintiff's claim arises out of false imprisonment and thus is barred by 28 U.S.C. § 2680(h).

AFFIRMED.

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appeal. *Cold Mountain v. Garber,* 375 F.3d 884, 891 (9th Cir.2004) (citing *Bolker v. Comm'r,* 760 F.2d 1039, 1042 (9th Cir.1985)). We leave open the question whether, under the FTCA, that theory would be viable.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BARBARA SNOW-ERLIN,
As Representative of the
Estate of Darrow K Erlin,
Plaintiff

Plaintiff,

v

UNITED STATES
OF AMERICA,

Defendant. /

No C-99-4050 VRW

ORDER

Before the court is defendant United States of America's ("the government") motion to dismiss for lack of subject matter jurisdiction pursuant to FRCP 12(b)(1) or, alternatively, for summary judgment pursuant to FRCP 56(c). Doc #37. The original plaintiff in this action, Darrow Kierov Erlin ("Erlin") has since died and his widow Barbara Snow-Erlin ("plaintiff") is pursuing the claim on behalf of Erlin's estate. Plaintiff also moves the court for partial summary judgment on the issue of liability. Doc #39. For the reasons that follow, the court GRANTS the government's motion to dismiss, and DENIES as moot plaintiff's motion for partial summary judgment.

I

The following facts and procedural history are derived from Erlin's complaint, this court's previous order of August 31, 2000 (Doc #23), and the Ninth Circuit Court of Appeals' opinion, found at *Erlin v United States,* 364 F3d 1127 (9th Cir 2004). In 1984, Erlin was sentenced to three years of incarceration (six months confined, remaining

two-and-a-half years suspended) and five years probation (commencing upon his release) for conspiracy and attempt to manufacture methaqualone in violation of 21 USC §§ 841(a)(1) and 846. In 1988, while out on probation, Erlin was convicted of possession of cocaine with intent to distribute in violation of 21 USC § 841(a)(1). For this violation, Erlin was sentenced to ten years non-parolable imprisonment, followed by eight years of supervised release. Because this second drug crime violated Erlin's 1984 probation conditions, the suspended two-and-a-half year sentence was re-imposed, to be served consecutively with the ten-year sentence. The Bureau of Prisons properly aggregated Erlin's three-year and ten-year sentences into a consecutive thirteen year term to calculate his mandatory release date under 18 USC § 4161 (now repealed). Erlin was released on February 17, 1995.

In 1996, Erlin again violated his sentencing conditions (this time, of his supervised release) when he failed to report that he had been arrested for drunk driving in March 1996. The Parole Commission issued a warrant for his arrest on May 9, 1996, and Erlin was arrested on this federal warrant on June 28, 1996. The court that handled Erlin's cocaine crime revoked his supervised release and ordered six months of imprisonment. Additionally, the Parole Commission held a hearing and revoked Erlin's mandatory release parole and ordered him to serve twenty additional months imprisonment consecutively with the court-imposed six months.

Erlin contested the Parole Commission's jurisdiction over him and filed an administrative appeal of its imposition of an additional twenty months. This appeal was unsuccessful. On January 13, 1997, Erlin filed a petition for writ of habeas corpus under 28 USC § 2241 in the

United States District Court for the Central District of California. On October 16, 1997, the writ was granted, and on November 17, 1997, Erlin was released. The district court reasoned that although Erlin's sentences had been correctly aggregated initially into a thirteen-year term, the Parole Commission's postconfinement jurisdiction over Erlin should have been based on his three-year sentence only. This was in accordance with the Anti-Drug Abuse Act of 1986, 18 USC § 3583, in which Congress intended to replace "parole" with a system of "supervised release" for most drug crimes, including the kind that Erlin had committed when he received his ten-year sentence. Hence, the Parole Commission lacked statutory authority over Erlin when it imposed the additional twenty months.

On November 1, 1998, Erlin filed a claim with the appropriate federal agency (the Federal Bureau of Prisons) as required procedurally by the Federal Tort Claims Act (FTCA), see 28 USC § 2675. More than six months passed without disposition. On August 31, 1999, Erlin filed the instant suit, alleging personal injury from the "negligent incarceration of plaintiff" by agents of the government. Doc #1, ¶ 1. Erlin claims that the government negligently calculated his parole period, causing him to be taken into custody on an invalid parole warrant and serve 311 days in prison after he should have been released. On August 31, 2000, the court dismissed Erlin's suit, holding that the two-year statute of limitations period on FTCA suits had expired because Erlin's cause of action had accrued on May 9, 1996, when the Parole Commission issued the warrant based on the miscalculated parole expiration. Doc #23.

Plaintiff appealed, and on April 19, 2004, the United States Court of Appeals for the Ninth Circuit reversed,

holding that Erlin's cause of action for negligent miscalculation of his release date did not accrue until he succeeded in challenging his continued imprisonment through his petition for writ of habeas corpus – which was granted on October 16, 1997. *Erlin,* 364 F3d at 1133-34. Because Erlin filed his FTCA claim within two years of October 16, 1997, the statute of limitations did not bar it. Id.

Currently before the court is the government's motion to dismiss Erlin's cause of action under 28 USC § 2680(h). Doc #37. As previously noted, this action is being pursued by decedent Erlin's estate, which also moves the court for partial summary judgment on the issue of liability. Doc #39. The government argues that Erlin's claim of negligence is a "disguised claim of false imprisonment," which is specifically excepted under the FTCA and thus the court lacks subject matter jurisdiction over the claim. The government also argues that Erlin's cause of action should be dismissed under 28 USC § 2680(a). Alternatively, the government moves for summary judgment.

II

Federal courts have limited subject matter jurisdiction and, unless jurisdiction is authorized by the Constitution or a statute, a federal court is presumed to lack jurisdiction. *Kokkonen v Guardian Ins Co of America,* 511 US 375, 377 (1994); *National Treasury Employees Union v Fed Labor Relation Authority,* 112 F3d 402, 404 (9th Cir 1997). The burden of establishing otherwise rests on the party asserting jurisdiction. *Kokkonen,* 511 US at 377.

Sovereign immunity protects the government from suit unless Congress specifically abrogates that immunity by statute. See e g, *Finn v United States,* 123 US 227, 233

(1887); *United States v Shaw,* 309 US 495, 504 (1940). The FTCA waived the government's sovereign immunity for injuries caused by government employees. Section 1346(b) reads in pertinent part:

> [The] district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for * * * personal injury * * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 USC § 1346(b). The FTCA is not, however, without exceptions. The United States retains its immunity from suit for certain enumerated intentional torts. Section 2680(h) reads in pertinent part:

> The provisions of this chapter [waiving sovereign immunity] * * * shall not apply to –
>
> *Any claim arising out* of assault, battery, *false imprisonment,* false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

28 USC § 2680(h) (emphasis added). Accordingly, this court's subject matter jurisdiction hinges on whether Erlin's claim falls under section 2680(h).

The government argues that Erlin's claim for "personal injury resulting from the negligent incarceration * * * by the government's employees" (Compl, ¶ 1) is a disguised claim of false imprisonment, which is specifically

excepted from the FTCA. Doc #37 at 7-9. The government urges the court to look at the "injury in fact" (id at 8:10) which gave rise to the claim and emphasizes the broad language of the statute – "any claim arising out of" – as an indication of Congress's intent (id at 8-9).

Plaintiff primarily contends that the Ninth Circuit previously decided this issue in its April 19, 2004, opinion, and this court is bound by the appellate court's resolution of an issue of law. Doc #44 at 8-10. Alternatively, plaintiff argues that Erlin was free to plead the cause of action of his choice. Id at 10-12.

The court disagrees that the Ninth Circuit either explicitly or by implication decided the issue whether Erlin's claim of negligence was a "disguised claim of false imprisonment." The Court of Appeals stated in the opening paragraph of its opinion: "This is a statute of limitations case. The issue is when a cause of action accrued for purposes of the statute of limitations under the Federal Torts Claim Act." *Erlin,* 364 F3d at 1129. To decide this issue, the court necessarily had first to take the theory of Erlin's case as given, and then determine when the cause of action accrued. The Court of Appeals had no reason to find that Erlin's cause of action was anything but what it purported to be: "negligence in miscalculating Erlin's release date" (id at 1130). A careful reading reveals that when the Court of Appeals later drew a distinction ("in fact [Erlin's claim] is not for false imprisonment[,] [i]t is for negligence") (id at 1133) it was to emphasize that a different result on the statute of limitations question might ensue if Erlin's claim, on its face, had been one for false imprisonment. This is supported by the fact that neither party briefed the Court of Appeals on the "disguised claim" issue at bar, nor did the Court of Appeals

make any reference to the Supreme Court's guidance in this area.

Turning to the issue whether Erlin's cause of action is "disguised," it is true that plaintiffs are ordinarily free to plead the cause of action of their choice. The question then becomes whether a claim for "negligence in calculating a prisoner's release date" can exist separately from a claim for "false imprisonment" in the context of the FTCA's waiver of sovereign immunity. The court finds it cannot. First, the liability of the government in an FTCA action is determined under the law of the state in which the act or omission occurred, in this case California. See *Delta Savings Bank v United States,* 265 F3d 1017, 1025 (9th Cir 2001). Under California law, the tort of false imprisonment can be committed by negligent as well as intentional conduct, *Sullivan v County of Los Angeles,* 12 Cal 3d 710, 718 (1974), and is broadly defined as the "unlawful violation of the personal liberty of another." Cal Penal Code § 236 (1999).

Next, courts have addressed the situation of negligence giving rise to an excluded claim under the FTCA. In their treatise on federal tort claims, Jayson & Longstreth summarized:

> [W]here the ultimate wrong involved constitutes one of the torts expressly excluded by the Torts Claims Act in 28 USC § 2680, claimants have attempted to escape the exclusion by relying on negligence that preceded such ultimate wrong.
>
> * * *
>
> On five separate occasions, the Supreme Court has addressed the issue of whether an allegation that governmental negligence accompanied the

> commission of an excluded tort permits a plaintiff to avoid the operation of the relevant FTCA exclusion. So far, the Court has declined to adopt the absolutist position that a claim is barred whenever an excluded tort is part of the factual circumstances underlying the suit. Instead, the test is whether plaintiff has stated a valid negligence claim that is wholly independent of the excluded tort.

Jayson & Longstreth, 2 *Handling Federal Tort Claims* § 9.05[2][h] (2005). Courts dealing with cases involving errors in calculating prison sentences have tended to dismiss those actions as ones for false imprisonment. See e g *Puccini v United States,* 978 F Supp 760, 761 (N D Ill 1997); *Shelton v United States,* 1991 WL 247815 at *1 (D D C).

It is this circuit's practice to "look[] beyond the labels used to determine whether a proposed claim is barred." *Thomas-Lazear v Federal Bureau of Investigation,* 851 F2d 1202, 1207 (9th Cir 1988). In *Thomas-Lazear,* plaintiffs' contended that federal officials conspired to defame them by making false statements. Id at 1203. The court noted: "[plaintiff] attempts to fashion slander and libel claims into a claim for negligent infliction of emotional distress by saying the officials were negligent in not foreseeing the effect of their slander in causing emotional distress." Id at 1206. The Ninth Circuit was not convinced, stating that: "the claim for negligent infliction of emotional distress is nothing more than a restatement of the slander claim, which is barred by section 2680(h). Put another way, the Government's actions that constitute a claim for slander are essential to Thomas-Lazear's claim for negligent infliction of emotional distress." Id at 1207. This logic controls the present case.

Moreover, a plaintiff must demonstrate that the factual circumstances would give rise to a permitted cause of action even had an excluded tort never been committed. *Sheehan v United States,* 896 F2d 1168, 1171 (9th Cir 1990). In *Sheehan,* the plaintiff alleged that her supervisor had subjected her to unwanted sexual advances forming the basis of an "intentional infliction of emotional distress" claim. Id at 1168. The district court granted summary judgment to the government, believing that this cause of action fell under the ambit of one "arising out of assault," and thus was expressly excluded from the FTCA. Id. The Court of Appeals reversed, stating:

> "[T]he Supreme Court has focused inquiry on the conduct upon which plaintiff's claim is based. Regardless of the plaintiff's characterization of the cause of action, § 2680(h) bars suit for claims based on conduct which constitutes one of the excepted torts, and bars suits for no other claims."

Id at 1171 (summarizing analysis of *United States v Neustadt,* 366 US 696 (1961) and *United States v Neal,* 460 US 289 (1983)). The Court of Appeals concluded that the tort of "intentional infliction of emotional distress" would be a cognizable cause of action under the FTCA, as long as the conduct comprising the injury for such a claim was independent from conduct that would give rise to a barred claim. Id at 1173.

Applying the above principles to the instant case, the court concludes that the alleged acts of governmental negligence (miscalculating plaintiff's parole expiration date and/or failing to ensure it was properly calculated) give rise to the excluded tort of false imprisonment. Taking plaintiff's allegations as true, it appears to the court that the government conduct alleged is precisely the

conduct that would render plaintiff's extended incarceration "false" or unlawful. As in *Thomas-Lazear,* plaintiff's claim for negligent incarceration "is nothing more than an effort to remove the damage element from an intentional tort barred by section 2680(h) and plead it separately[,]" 851 F2d at 1206. Here, Erlin's damages arise from his false imprisonment. (See Compl, Doc #1, ¶ 21, "Erlin spent [311] days in Federal custody * * * causing him to suffer actual monetary damages and to suffer bodily injury, humiliation, mental anguish, and emotional distress.") Applying *Sheehan,* the court finds that plaintiff has not demonstrated that Erlin suffered any damages unrelated to the unlawful incarceration. Nor has plaintiff even attempted to do so. The "negligent" injury-causing conduct is inextricably linked to conduct giving rise to the barred tort of false imprisonment.

III

In sum, the court GRANTS the government's motion to dismiss plaintiff's complaint with prejudice pursuant to FRCP 12(b)(1). Because plaintiff's claim is barred under § 2680(h), the court DENIES as moot plaintiff's motion for partial summary judgment. The clerk shall close the file and terminate all motions.

IT IS SO ORDERED.

[July 15, 2005] /s/ Vaughn R. Walker
VAUGHN R WALKER
United States District
Chief Judge

364 F.3d 1127

United States Court of Appeals, Ninth Circuit.
Darrow Kierov ERLIN, Plaintiff,
and Barbara Snow-Erlin, Appellant,
v.
UNITED STATES of America, Defendant-Appellee.
No. 00-16986.

Argued and Submitted Sept. 12, 2002.
Filed April 19, 2004.

Margaret Engelhardt (argued), certified law student at University of California School of Law, Davis, California, for the appellant.

Carter C. White (briefed supplemental opening brief), Supervising Attorney, University of California School of Law, Davis, California, for the appellant.

Darrow Kierov Erlin (briefed opening brief), pro per, Oakland, California, appellant.

Jocelyn Burton, Assistant U.S. Attorney, San Francisco, California, for the appellee.

Appeal from the United States District Court for the Northern District of California; Vaughn R. Walker, District Judge, Presiding.

Before: KOZINSKI and KLEINFELD, Circuit Judges, and BEISTLINE,* District Judge.

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* The Honorable Ralph R. Beistline, United States District Judge for the District of Alaska, sitting by designation.

OPINION

KLEINFELD, Circuit Judge.

This is a statute of limitations case. The issue is when a cause of action accrued for purposes of the statute of limitations under the Federal Tort Claims Act. The action is for miscalculation of parole, with consequent imprisonment of a person who should have been released.

Facts

Erlin committed crimes both before and after the Sentencing Reform Act of 1984, and kept committing new ones while still under sentence for the old ones, making computation of his release date complex. He was convicted in 1984 for conspiracy to manufacture and attempt to manufacture methaqualone, in violation of 21 U.S.C. §§ 841 and 846. He was sentenced to three years, on condition that he be confined six months, with the remaining two-and-a-half years suspended, plus five-years probation to commence upon his release.[1] While on probation after his May 1986 release from prison, Erlin was convicted in 1988 of possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). The district court sentenced Erlin to ten years to serve, followed by eight years of supervised release. The ten-year sentence was not subject to parole. In addition, the probation on Erlin's 1984 conviction was revoked, and the remaining two-and-a-half years of imprisonment imposed, to be served consecutively with the ten-year sentence.

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[1] The crime was pre-Sentencing Guidelines, so the sentencing terminology and rules were different from what they are now. The differences have no bearing on this case, so we need not explicate them.

The Bureau of Prisons aggregated the sentences[2] and treated the combined time as a thirteen-year sentence for the purpose of calculating Erlin's release date. He was released February 17, 1995. His release was pursuant to a statute then in effect providing for mandatory release at the expiration of the term, less time deducted for good conduct, with the prisoner deemed to be on parole thereafter until the expiration of the term to which he was sentenced less 180 days.[3]

Erlin again failed to comply with conditions. He was arrested for driving under the influence on March 19, 1996. On account of his failure to report the arrest, his failure to report his change of address, his excessive use of alcohol, and his driving under the influence, the Parole Commission issued a warrant for his arrest, and he was arrested on this federal warrant on June 28, 1996. His supervised release on the ten-year cocaine term was revoked, and he was sentenced to serve an additional six months in prison. In addition, the Parole Commission revoked his mandatory-release parole and ordered him to serve an additional twenty months of imprisonment consecutively with the six months on his supervised-release revocation.

Erlin filed a timely administrative appeal of the twenty-month sentence that the Parole Commission tacked on. He lost. On January 13, 1997, he filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241 in the

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[2] Aggregation was under 18 U.S.C. § 4161. That statute has since been repealed. Sentencing is now under the Sentencing Reform Act of 1984, the effective date of which was November 1, 1987. The changes have no bearing on the questions before us.

[3] 18 U.S.C. §§ 4163, 4164 (repealed).

United States District Court for the Central District of California. He prevailed, and the court granted the writ on October 16, 1997. Erlin was released November 7, 1997. The basis for the writ was that Erlin's parole should have been based only on his 1984 three-year sentence, not the aggregated thirteen-year sentence, because parole had been abolished when the ten-year sentence was imposed, so parole had expired and the Parole Commission had no jurisdiction over Erlin when it imposed the additional and consecutive twenty months. The United States did not appeal, and that decision became final. We therefore have no occasion to examine the correctness of the district court's decision that held that Erlin was mistakenly confined too long. Erlin claims that the effect of the determination in his habeas case is that he served 311 days in prison after he should have been released.

On November 1, 1998, slightly less than a year after his November 7, 1997 release, Erlin filed a claim under the Federal Tort Claims Act for damages on account of the error, and he filed suit on November 4, 1998. He claimed that he suffered a stroke while in prison under the mistaken calculation. He died after release, and his widow is pursuing this appeal on behalf of his estate.

The theory of the claim is negligence in miscalculating Erlin's release date, not false imprisonment. The district court dismissed the suit, holding that Erlin's cause of action had accrued on or about May 9, 1996, when the Parole Commission issued the warrant based on the miscalculated parole expiration. Based on that date, the court held that the two-year limitations period on FTCA suits expired before Erlin filed his claim on November 1, 1998. Erlin appeals.

Analysis

We review the district court's dismissal on statute-of-limitations grounds de novo.[4] We also review de novo the question of the appropriate accrual date, unless the choice of that date turns in part on what a reasonable person knew or should have known. In that instance, the question is a mixed question of law and fact, which we review for clear error.[5]

The relevant statute of limitations is two years to file a claim, then six months from notice of denial.[6] The six months to file the action in court is not at issue in this appeal, just the two years to file the claim. The issue is when the cause of action accrued.

Even though the action is for miscalculation of the release date, we conclude that the cause of action did not accrue when the Parole Commission made the miscalculation. The reason is that one more thing had to happen before Erlin had a claim for the miscalculation. He had to prevail in a habeas case establishing that he was entitled to release. So long as he was incarcerated, a judgment for damages for the miscalculation would necessarily imply that he was wrongfully imprisoned. Thus, the cause of action could not accrue until he won a writ of habeas corpus. Erlin filed his claim within two years of the issuance of the writ, so his action was timely.

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[4] *See Papa v. United States*, 281 F.3d 1004, 1009 (9th Cir.2002).

[5] *See Barileson v. United States*, 96 F.3d 1270, 1274 (9th Cir.1996).

[6] 28 U.S.C. § 2401(b).

We so infer from the Supreme Court's reasoning in *Heck v. Humphrey.*[7] That was a § 1983 suit for damages resulting from constitutional torts in the course of a criminal investigation and prosecution. Although the lawsuit did not seek release as a remedy, just damages, the Supreme Court held that the cause of action did not accrue when the constitutional torts occurred. The Court held as follows:

[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.[8]

The Court noted that the somewhat analogous common law tort of malicious prosecution requires favorable termination of the criminal prosecution in favor of the accused, because of the interest in avoiding parallel litigation over common issues such as guilt, the strong judicial policy against the creation of two conflicting resolutions, and the undesirability of collateral attack on the criminal prosecution in a civil suit.[9] In light of these interests, the Court concluded that the "hoary principle that civil tort actions are not appropriate vehicles for

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[7] *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994).

[8] *Id.* at 486-87, 114 S.Ct. 2364 (footnote omitted).

[9] *Id.* at 484, 114 S.Ct. 2364.

challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement."[10]

The *Heck* requirement of favorable termination of the criminal proceeding before a § 1983 action can be brought does "not engraft an exhaustion requirement upon § 1983, but rather den[ies] the existence of a cause of action."[11] Thus, the "statute of limitations poses no difficulty" while other challenges to the conviction or imprisonment are being pursued, "since the § 1983 claim has not yet arisen."[12] The § 1983 cause of action "does not accrue until the conviction or sentence has been invalidated."[13]

It is clear enough that *Heck* is distinguishable from the case at bar. Erlin does not challenge the validity of his convictions or the sentences imposed upon those convictions, and the invalidity of his convictions or sentences is not necessary to his damages claim. But this is a distinction without a difference. Erlin's claim for damages was for the miscalculation of his required term of imprisonment under his valid sentences. A judgment that the term had been miscalculated, issued while he was still imprisoned, would raise the same problems that led the Court to hold in *Heck* that no § 1983 cause of action had accrued.

Another distinction between this case and *Heck* is the federal statute under which the plaintiff sues. *Heck*

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[10] *Id.* at 486, 114 S.Ct. 2364.

[11] *Id.* at 489, 114 S.Ct. 2364.

[12] *Id.*

[13] *Id.* at 490, 114 S.Ct. 2364.

involved a § 1983 action. Here, the Federal Tort Claims Act supplies the statutory basis for the suit. This distinction also makes no difference, under the ratio decidendi of *Heck*. Just as a successful § 1983 action would have impugned the validity of the conviction in *Heck*, so too would a successful suit under the FTCA have impugned the validity of Erlin's continuing imprisonment. A successful FTCA suit might even have had preclusive effect, so that Erlin could have forced his release from prison without a habeas petition.[14] Therefore, the same need to restrict when a claim accrues arises in an FTCA suit as in a § 1983 suit.

Notwithstanding the similarity of the interests at stake in the two types of suits, the distinction between § 1983 suits and FTCA suits is arguably more material than the distinction between suits challenging the underlying conviction and suits challenging miscalculations of sentences. In § 1983 suits, the underlying cause of action is federal. Because a federal statute provides the underlying cause of action, the Supreme Court was able to hold, as a matter of federal law, that the cause of action simply does not become cognizable until and unless the conviction or imprisonment is deemed improper. In the Supreme Court's words, it was "deny[ing] the existence of a cause of action" until the conviction or sentence has been

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[14] The Supreme Court recognized this possibility in *Heck*. "[W]ithout implying the nonexistence of" the issue, it declined to rest its holding on the possibility of preclusion, noting that the preclusive effect of a judgment depends on state law. *Id.* at 480 n. 2, 114 S.Ct. 2364. We likewise offer preclusion here merely as an illustration of how an FTCA suit might interfere with the underlying conviction or imprisonment, and our analysis does not depend on whether a successful FTCA suit would have preclusive effect.

invalidated.[15] In contrast, where the underlying cause of action comes from state law, as in an FTCA claim,[16] a federal court is not free to append such a rule of cognizability directly onto the underlying cause of action. What is cognizable under a given cause of action is a matter of state, not federal, tort law.

Nevertheless, the time of accrual of an FTCA claim is subject to the federal law set out in *Heck*. The interests the Supreme Court identified in *Heck* require us to impose the same restriction on FTCA claims that *Heck* imposed on § 1983 actions. Though the underlying cause of action might otherwise have accrued earlier under state law, where the litigation would potentially force release of a prisoner, *Heck* imposes an additional requirement. This approach is consistent with the general structure of the FTCA, which incorporates state-law torts while also adding restrictions of its own on how those torts are to apply in suits against the United States.[17] Both *Heck* and this case require interpretation of federal statutes. Just as the Supreme Court read § 1983 as containing a restriction on when a litigant can bring a suit that impugns the validity of a conviction or imprisonment, we read the

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[15] *Id.* at 489, 114 S.Ct. 2364.

[16] *See Molzof v. United States*, 502 U.S. 301, 305, 112 S.Ct. 711, 116 L.Ed.2d 731 (1992) ("[T]he extent of the United States' liability under the FTCA is generally determined by reference to state law.").

[17] *Compare, e.g., Will v. United States*, 60 F.3d 656, 659 (9th Cir.1995) (per curiam) (interpreting the FTCA to determine whether the United States could be sued for an independent contractor's actions), *with id.* at 659-60 (analyzing the elements of state negligence law to determine the government's liability under the FTCA, because "[i]ts liability is determined under the law of the state where the act or omission occurred").

FTCA as containing the very same restriction. And we do so for the same reasons.

The distinction between FTCA and § 1983 suits suggests at least as much of a need to impose a restriction on FTCA actions as on § 1983 actions. Whereas § 1983 actions by definition involve challenges to state actors based on federal law, FTCA actions involve challenges to the actions of federal actors based on state law. The states, of course, "have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government."[18] Thus, state law cannot control accrual of an FTCA action that affects the detention of prisoners by federal authorities, before that detention is otherwise deemed invalid.

We thus hold that a civil action under the Federal Tort Claims Act for negligently calculating a prisoner's release date, or otherwise wrongfully imprisoning the prisoner, does not accrue until the prisoner has established, in a direct or collateral attack on his imprisonment, that he is entitled to release from custody.[19]

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[18] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436, 4 L.Ed. 579 (1819).

[19] We also so held in *Alvarez-Machain v. United States*, 107 F.3d 696, 700-01 (9th Cir.1997). This opinion in *Alvarez-Machain* led to a petition for certiorari, which the Supreme Court denied. *Berellez v. Alvarez-Machain*, 522 U.S. 814, 118 S.Ct. 60, 139 L.Ed.2d 23 (1997). The mandate issued and the case was remanded. After remand, the case returned to us. Following a panel opinion, we reheard the case en banc and issued an opinion. *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir.2001) (en banc). The Supreme Court then granted certiorari. *Sosa v. Alvarez-Machain*, ___ U.S. ___, 124 S.Ct. 807, 157 L.Ed.2d 692 (2003); 540 U.S. 1045, 124 S.Ct. 821, 157 L.Ed.2d 692 (2003).

(Continued on following page)

Because Erlin brought his successful habeas attack while he was an inmate and was released on account of that attack, we do not have occasion to decide whether the same result would apply if the subsequent tort action were brought after the prisoner had been released, without any such attack.

The government urges that Erlin's imprisonment was not a continuing tort, but rather involved only continuing damages from the completed tort of negligent miscalculation. The argument is immaterial because the applicability of the *Heck* rationale means that the cause of action had not yet accrued when Erlin's parole was miscalculated. Likewise, the government's argument that Erlin had reason to know of the miscalculation when he was arrested is immaterial. It does not matter whether he knew of the government's negligent miscalculation at that time, because a suit for negligence was not available to him until he had successfully challenged his confinement through his petition for a writ of habeas corpus.

The government argues that *Heck* should be distinguished because Erlin's claim is for false imprisonment, not malicious prosecution. But in fact it is not for false imprisonment. It is for negligence. While *Heck* did distinguish between false imprisonment and malicious prosecution in seeking a tort that was analogous to a § 1983 challenge to a conviction, and while it did draw on the elements of malicious prosecution rather than false imprisonment in aid of its reasoning,[20] we have no occasion to

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Neither our subsequent opinions nor the questions on which the Supreme Court granted certiorari address the statute-of-limitations issue.

[20] *See Heck*, 512 U.S. at 484, 114 S.Ct. 2364.

decide here whether *Heck* would also delay the accrual of a false imprisonment claim under the FTCA.

Finally, the government's citations to cases not involving criminal conviction or confinement, including *Davis v. United States*[21] and *Dyniewicz v. United States,*[22] do not undermine our conclusion. The *Heck* problem arises specifically and particularly in the context of convictions and sentencing in criminal cases.

Erlin's cause of action for negligent miscalculation of his release date did not accrue until he succeeded in challenging his continued imprisonment through his petition for a writ of habeas corpus. He filed his claim within two years of that date, so the statute of limitations did not operate as a bar.

REVERSED.

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[21] *Davis v. United States,* 642 F.2d 328 (9th Cir.1981).

[22] *Dyniewicz v. United States,* 742 F.2d 484 (9th Cir.1984).

Not Reported in F.Supp.2d, 2000 WL 1268246 (N.D.Cal.)

United States District Court, N.D. California.
Darrow Kierov ERLIN, Plaintiff,
v.
UNITED STATES OF AMERICA, Defendant.
No. C 99-4050 VRW.

Aug. 31, 2000.

ORDER

WALKER, J.

In 1984, in the District of Nevada, plaintiff pleaded guilty to conspiring to manufacture and attempting to manufacture methaqualone in violation of 21 USC §§ 841(a)(1) and 846. Plaintiff was sentenced to three years of incarceration, of which defendant was to serve at least six months, and five years probation. In 1984, while on probation, plaintiff pleaded guilty in the Northern District of California to possession of cocaine with the intent to distribute. The court imposed a ten year non-parolable sentence with eight years of supervised release to follow.

The Nevada court found that the California cocaine conviction violated the terms of probation and ordered plaintiff to serve three years of incarceration. The Bureau of Prisons aggregated plaintiff's three year and ten year sentences into a consecutive thirteen year term in order to calculate his mandatory release date under 18 USC § 4161 (now repealed).[1] Plaintiff was released on February 17, 1995.

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[1] Under federal law prior to the Sentencing Reform Act of 1984, a prisoner could be released before expiration of the full term of sentence

(Continued on following page)

In 1996, plaintiff moved his residence without informing his probation officer, violating the conditions of his supervised release in the California case. On June 28, 1996, plaintiff was taken into federal custody pursuant to a parole warrant issued by the United States Parole Commission. The California court revoked plaintiff's supervised release and ordered six months of imprisonment. In addition, the parole commission held a hearing, revoked plaintiff's mandatory release parole and ordered plaintiff to serve twenty additional months imprisonment. Plaintiff requested administrative relief from the parole commission's decision without success.

On January 31, 1997, plaintiff filed a petition for writ of habeas corpus in the Central District of California. Magistrate Judge Elgin Edwards granted the petition, finding that the parole commission erroneously determined petitioner's parole expiration date. Judgment, Def Exh N. Magistrate Judge Edwards determined that "the Parole Commission's postconfinement jurisdiction over petitioner should have been based on his three-year sentence only," that "the maximum period for parole supervision * * * had already expired prior to the date petitioner allegedly violated parole" and that "imposing custody based on the parole violation would be beyond the Parole Commission's statutory authority." Judgment, Def Exh N. The government's motion for reconsideration was denied. *See* Order, Def Exh O. Plaintiff was released from prison on November 7, 1997.

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through good conduct time deductions. *See* 18 USC § 4163 (now repealed). Time deductions for good conduct were calculated based on the length of a sentence. *See* 18 USC § 4161 (now repealed).

On November 4, 1998, plaintiff filed suit in this court under both the Federal Tort Claims Act (FTCA) and *Bivens*[2] against the parole commission, the Bureau of Prisons and several individuals. That action was later dismissed without prejudice. On August 31, 1999, plaintiff filed the above captioned action under the FTCA, alleging personal injury from the negligent incarceration of plaintiff by agents of defendant. Plaintiff claims that the parole commission improperly calculated his parole period, causing plaintiff to be taken into custody on a parole warrant and unlawfully to serve 313 days in prison.

Before the court is the government's motion to dismiss or, in the alternative, for summary judgment. The court finds this motion suitable for determination without oral argument. *See* Civil LR 7-1(b). The hearing scheduled for August 31, 2000, at 2:00 pm is, therefore, VACATED.

Federal law determines when a cause of action accrues and the statute of limitations begins to run. *See Elliott v. City of Union City,* 25 F.3d 800, 801-02 (9th Cir.1994). The general federal rule is that a limitations period begins to run when the plaintiff is injured. *See Davis v. United States,* 642 F.2d 328, 330 (9th Cir.1981). It is also well established law that a tort claim accrues on the date of the last event necessary to complete the tort. *See Warminster Tp. Mun. Authority v. US,* 903 F.Supp. 847 (E.D.Pa.1995). If a tort claim against the United States is not filed within the appropriate statute of limitations, the

[2] In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the Supreme Court held that a violation of constitutionally protected rights by a federal agent acting under color of his authority gives rise to a cause of action for damages.

court lacks jurisdiction over the claim. *See Caton v. United States,* 495 F.2d 635, 637 (9th Cir.1974).

The statute of limitations for plaintiff's tort claim is two years. *See* 28 USC § 2401(b). The plaintiff, therefore, must have brought his claim within two years after he was injured or the tort was complete. Plaintiff contends that his losses and damages include the 313 day wrongful incarceration, warranting an accrual date of November 7, 1997. The injury of which plaintiff complains, however, is the error committed by the parole commission in calculating his parole expiration date and ultimately issuing a parole warrant. The alleged error by the parole commission occurred by May 9, 1996, the day the warrant was issued. The statute of limitations, therefore, accrued by that date. Furthermore, plaintiff's incarceration from June 28, 1996, to November 7, 1997, constitutes a continuing ill effect of the parole commission's miscalculation rather than a coninuing [sic] tort. *See Maslauskas v. United States,* 583 F.Supp. 349 (D.Mass.1984).

Both the first action filed on November 4, 1998, and the instant action filed on August 31, 1999, were commenced more than two years after May 9, 1996. The instant action, therefore, is time-barred. Defendant's other defenses are moot and need not, therefore, be addresses [sic]. Defendant's motion to dismiss is GRANTED. The clerk shall close the file.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BARBARA SNOW-ERLIN, as representative of the Estate of Darrow K. Erlin, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee.	No. 05-16790 D.C. No. CV-99-04050-VRW Northern District of California, San Francisco ORDER

(Filed Jan. 23, 2007)

Before: GRABER, MCKEOWN, and TALLMAN, Circuit Judges.

The panel has voted to deny the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.

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(2)

No. 06-1411

Supreme Court, U.S.
FILED
JUL 25 2007
OFFICE OF THE CLERK

In the Supreme Court of the United States

BARBARA SNOW-ERLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a federal prisoner's claim that the United States Parole Commission erred in determining his parole expiration date and therefore improperly extended his confinement by 311 days was excluded from the Federal Tort Claims Act's waiver of sovereign immunity because it "ar[ose] out of * * * false imprisonment" which was not an "act[] or omission[] of [an] investigative or law enforcement officer[] of the United States Government." 28 U.S.C. 2680(h).

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In the Supreme Court of the United States

No. 06-1411

BARBARA SNOW-ERLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 470 F.3d 804. The order of the district court granting the United States' motion to dismiss (Pet. App. 9-18) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2006, and amended on December 6, 2006. A petition for rehearing was denied on January 23, 2007 (Pet. App. 35). The petition for a writ of certiorari was filed on April 23, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, waives the government's sovereign immunity and renders the United States liable for certain tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. Congress expressly excluded from that waiver of immunity, however, claims "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, [and] abuse of process." 28 U.S.C. 2680(h). A plaintiff nevertheless may bring suit for such torts if they arise out of "acts or omissions of investigative or law enforcement officers of the United States Government." *Ibid.* An "investigative or law enforcement officer" is "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Ibid.*

2. In 1984, petitioner's decedent Darrow K. Erlin pleaded guilty in the United States District Court for the District of Nevada to conspiring to manufacture and attempting to manufacture methaqualone, in violation of 21 U.S.C. 841(a)(1), 846. Pet. App. 2, 9-10, 31. The court sentenced him to three years of imprisonment and five years of probation, with all but six months of the sentence of imprisonment suspended. *Ibid.*

In 1988, Erlin pleaded guilty in the United States District Court for the Northern District of California to possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). That court sentenced him to ten years of imprisonment and eight years of supervised release. Pet. App. 2, 10, 31. Because the California conviction violated the terms of his Nevada probation,

Erlin's previously suspended two-year sentence for the methaqualone conviction was reimposed. The Bureau of Prisons (BOP) correctly determined Erlin's mandatory release date by aggregating the two sentences into a 13-year term of imprisonment. *Id.* at 2-3, 10.

Erlin was released from prison in 1995 and was arrested the next year for driving under the influence of alcohol. Pet. App. 3, 10. He failed to report that violation to his parole officer. *Ibid.* As a result of the arrest and his failure to report, the district court for the Northern District of California revoked his supervised release for the cocaine conviction and sentenced him to six months of imprisonment. *Ibid.* The United States Parole Commission (Commission), in turn, revoked Erlin's parole and ordered him to serve an additional 20 months of imprisonment. *Ibid.*

In 1997, Erlin filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the Central District of California, challenging the jurisdiction of the Commission to order him to serve an additional term of imprisonment. Pet. App. 3, 10-11. The district court granted the petition, reasoning that, because the Sentencing Reform Act of 1984 had rendered Erlin's cocaine conviction non-parolable, the Commission's postconfinement jurisdiction over Erlin was limited to his initial three-year Nevada sentence. That parole had expired by the time he was arrested for driving under the influence. The district court therefore held that, at the time of his 1996 arrest, the Commission lacked jurisdiction to require that he serve an additional period of imprisonment. *Id.* at 3, 11. The government did not appeal the district court's decision, and Erlin was released. *Id.* at 3.

3. In 1999, Erlin filed suit against the United States "for personal injury resulting from the negligent incar-

ceration of plaintiff by the government's employees." Pet. App. 3.[1] He claimed that "the Parole Commission * * * failed to exercise due care" in determining his parole expiration date and keeping him in custody without legal authority to do so. C.A. E.R. 4; see Pet. App. 3-4. Following Erlin's death in 2002, petitioner Barbara Snow-Erlin took over his claim on behalf of his estate. *Id.* at 4.

a. The government initially moved to dismiss Erlin's suit on the ground that the two-year statute of limitations on FTCA suits had expired before Erlin filed his claim. Pet. App. 22. The district court granted that motion, holding that petitioner's cause of action accrued on the date when the Commission erroneously calculated Erlin's parole expiration date. See *id.* at 31-34. Petitioner appealed, and the court of appeals reversed, holding that the cause of action did not accrue until the district court held in Erlin's habeas action that he was unlawfully confined. *Id.* 19-30; see *id.* at 11-12.

b. On remand, the government moved to dismiss the action for lack of subject matter jurisdiction, invoking the bar on tort claims arising out of false imprisonment. 28 U.S.C. 2680(h). The district court dismissed petitioner's complaint with prejudice. Pet. App. 18. Although petitioner argued that the complaint stated a claim of negligence, not false imprisonment, the district court determined that "the alleged acts of governmental negligence (miscalculating plaintiff's parole expiration date and/or failing to ensure it was properly calculated)" were "precisely" the type of conduct "that would render

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[1] Erlin first filed an administrative complaint, as required by 28 U.S.C. 2675, with the BOP. That agency referred the complaint to the Commission. C.A. E.R. 6. This suit followed the Commission's failure to act on the complaint. *Ibid.*; see 28 U.S.C. 2675(a).

plaintiff's extended incarceration 'false' or unlawful" and thus "giv[e] rise to the barred tort of false imprisonment," for which Congress had not waived immunity. *Id.* at 17-18.

4. a. The court of appeals affirmed. Pet. App. 1-8. It noted that petitioner had "couche[d] her claim in terms of negligence" but recognized that it was required to "look beyond [the party's] characterization to the conduct on which the claim is based" in order to determine whether the claim fell within the waiver of sovereign immunity in the FTCA. *Id.* at 7 (brackets in original) (quoting *Mt. Homes, Inc.* v. *United States*, 912 F.2d 352, 356 (9th Cir. 1990)). The court also explained that the question "[w]hether a claim for negligent miscalculation of a release date arises out of false imprisonment for purposes of the FTCA [wa]s a question of first impression" for any appellate court. Pet. App. 6-7. Because "[t]he only harm [petitioner] alleged is that the United States kept Erlin imprisoned for 311 days too long," the court concluded that petitioner "cannot sidestep the FTCA's exclusion of false imprisonment." *Id.* at 7-8.

b. Petitioner filed a petition for rehearing, arguing for the first time (see Pet. 4) that the court's dismissal was "inconsistent" with the provision of the FTCA that "does not bar claims 'arising out of' intentional torts committed by 'law enforcement officers.'" Pet. for Reh'g 2. The court of appeals denied the petition without comment. Pet. App. 35.

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

1. Petitioner argues (Pet. 6-11) that the court of appeals misinterpreted the phrase "false imprisonment" as it is used in 28 U.S.C. 2680(h). This case appears to be the first in which a court of appeals has decided whether a prisoner can sue the United States in tort for miscalculating his release date. See Pet. App. 6-7 ("Whether a claim for negligent miscalculation of a release date arises out of false imprisonment for purposes of the FTCA is a question of first impression for this court and, so far as we can determine, for any federal appellate court."). Given the relative rarity with which the question arises and the absence of any conflict among the courts of appeals, this Court's review is not warranted.

As petitioner acknowledges (Pet. 9), she seeks only error correction, but there was no error. The court of appeals correctly held that petitioner's claim "aris[es] out of * * * false imprisonment," 28 U.S.C. 2680(h), and therefore is excluded from the FTCA's waiver of sovereign immunity. The scope of the FTCA's exclusion of certain intentional torts, including false imprisonment, is "by definition a federal question." *Molzof* v. *United States*, 502 U.S. 301, 305 (1992); see *United States* v. *Neustadt*, 366 U.S. 696, 706 (1961) (noting that "the intended scope of the Federal Tort Claims Act * * * depends solely upon what Congress meant by the language it used in § 2680(h)").

Contrary to petitioner's assertion (Pet. 6), the court of appeals did not look to state law to determine the meaning of "false imprisonment" in the FTCA. The court instead stated simply that because "[t]he only harm alleged is that the United States kept Erlin imprisoned for 311 days too long," petitioner stated no claim "[i]ndependent of that alleged false imprison-

ment." Pet. App. 7-8. That conclusion comports with the "traditional and commonly understood legal definition" of false imprisonment. *Neustadt*, 366 U.S. at 706; see *Block* v. *Neal*, 460 U.S. 289, 296-297 & n.6 (1983). "[C]onfinement otherwise than by arrest under a valid process is customarily called a false imprisonment." Restatement (Second) of Torts § 35 cmt. a (1965). In this case, it is undisputed that the Parole Commission was without jurisdiction to order Erlin's continued confinement. Pet. App. 3; see C.A. Supp. E.R. 14 (underlying habeas court finding that "the Parole Commission lacked statutory authority to include any portion of [Erlin's] ten-year sentence in its computation of [Erlin's] parole expiration date"). Erlin therefore was held for 311 days without valid legal authority. His claim for damages from that wrongful confinement squarely "aris[es] from * * * false imprisonment." 28 U.S.C. 2680(h).[2]

Petitioner's arguments to the contrary are unavailing. As described above, Erlin was not "confined by a valid legal process." Pet. 9. Although the arrest that led to his detention and his six-month sentence for violating the terms of his supervised release may have been lawful, the period of confinement for which petitioner claims damages was without authority. Petitioner also appears to draw a distinction between false imprisonment and malicious prosecution. Pet. 8 n.1. Both torts,

[2] Petitioner does not appear to challenge the court of appeals' conclusion that "the gravamen of the complaint is a claim for false imprisonment" rather than negligence. Pet. App. 7. Nor could she. It is well established that Section 2680(h) excludes claims "that sound in negligence but stem from" an excluded tort like false imprisonment. *United States* v. *Shearer*, 473 U.S. 52, 55 (1985) (opinion of Burger, C.J.); *Thomas-Lazear* v. *FBI*, 851 F.2d 1202, 1206-1207 (9th Cir. 1988).

however, are excluded from the government's waiver of sovereign immunity, 28 U.S.C. 2680(h), and the distinction is therefore of no practical significance.

2. Petitioner's argument (Pet. 9-11) that the law enforcement exception to the general bar on suits against the government for false imprisonment applies to this case was not presented to the district court or the court of appeals in a timely manner. As petitioner acknowledges, she raised that issue only in her petition for rehearing. Pet. 4; see Pet. for Reh'g 2-5. The issue was therefore waived. See, *e.g.*, *Squaw Valley Dev. Co.* v. *Goldberg*, 395 F.3d 1062, 1064 (9th Cir. 2005) (noting that court of appeals generally reviews only issues distinctly raised in party's opening brief). "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (citation omitted).

In any event, the law enforcement exception does not apply and there is no conflict among the courts of appeals that would justify review. Section 2680(h) waives the government's sovereign immunity to suits arising out of false imprisonment if the tort has been committed by a "law enforcement officer." 28 U.S.C. 2680(h). The statute defines "law enforcement officer" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Ibid.*

Petitioner's complaint arises out of a wrongful act of the Commission.[3] C.A. E.R. 6-7. Petitioner contended

[3] Congress has since repealed the Commission's authority over most federal prisoners. See 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11017, 116 Stat. 1824.

throughout the proceedings below that Erlin's wrongful incarceration was the result of errors made by the Commission in its parole determination. *Id.* at 3-4. And in petitioner's underlying habeas proceeding, the district court concluded that petitioner was improperly confined because the Commission acted outside of its jurisdiction. Pet. App. 3. Petitioner's contention (Pet. 10) that Erlin was "incarcerated by officials of the Bureau of Prisons," Pet. 10, is beside the point: Erlin's false imprisonment was the result of an error by the Commission, as petitioner's complaint states repeatedly. C.A. E.R. 3-4, 6-7.

Members of the Parole Commission were not "law enforcement officers" within the meaning of Section 2680(h). See *Wilson* v. *United States*, 959 F.2d 12, 15 (2d Cir. 1992). Their statutory authority included the ability to "request probation officers" to take certain law enforcement actions, but members of the Commission were not themselves authorized to take such actions. 18 U.S.C. 4203(b)(4) (1994). The Commission could issue warrants for arrest, but those warrants had to be executed by a "Federal officer authorized to serve criminal process." 18 U.S.C. 4213(d) (1994). Nor did the Commission (or its delegates) have authority to execute searches or seize evidence. See *Wilson*, 959 F.2d at 15.[4]

[4] Because there is no question that Parole Commissioners are not "law enforcement officers" within the meaning of the FTCA, this Court need not address the scope of the law enforcement exception, an issue on which the courts of appeals appear to have reached different results. Compare *Pooler* v. *United States*, 787 F.2d 868, 872 (3d Cir.) (waiver of sovereign immunity "limited to activities in the course of a search, a seizure or an arrest"), cert. denied, 479 U.S. 849 (1986), with *Sami* v. *United States*, 617 F.2d 755, 764-765 (D.C. Cir. 1979) (stating in dictum that law enforcement proviso meant to provide a tort remedy for "law enforcement abuses" more broadly). The lack of any development of this issue in the court of appeals further counsels against review.

The law enforcement exception therefore does not apply to petitioner's claim, and her suit is barred by the Federal Tort Claims Act.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
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JULY 2007

[5] This case does not implicate the question presented in *Ali* v. *Federal Bureau of Prisons*, cert. granted, 127 S. Ct. 2875 (2007). *Ali* concerns the proper interpretation of the phrase "any other law enforcement officer" in 28 U.S.C. 2680(c), which precludes the government's liability in tort for "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or *any other law enforcement officer*." *Ibid.* (emphasis added). Although Section 2680(h) also uses the phrase "law enforcement officer," it defines that phrase "[f]or the purpose of [that] subsection." 28 U.S.C. 2680(h); see pp. 2, 8, *supra*. The two subsections therefore are independent of one another.

(3)

No. 06-1411

In The

Supreme Court of the United States

BARBARA SNOW-ERLIN, as
Representative of the Estate of Darrow K. Erlin,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PETITIONER'S REPLY BRIEF

A. This Case Presents The Straightforward Legal Question Whether Officers Of The Federal Bureau Of Prisons Are Law Enforcement Officers Under The Federal Tort Claims Act, 28 U.S.C. § 2680(h), Allowing Individuals To Recover For False Imprisonment By Law Enforcement Officers

Both the Ninth Circuit and Respondent have failed to apply the plain language contained in 28 U.S.C. Section 2680(h) to Petitioner's claims. This Section explicitly excepts "investigative or law enforcement officers" from the Federal Tort Claims Act's ("FTCA") general grant of sovereign immunity for certain torts, including false imprisonment. See 28 U.S.C. § 2680(h). Although the Ninth Circuit determined that Petitioner suffered false imprisonment (Pet. App. 1-8), the court erroneously held that the FTCA barred Petitioner's claim. *Id.* at 7-8. In so holding, the Ninth Circuit misapplied Section 2680(h) of this Act. Because Petitioner has stated a claim for false imprisonment, and Petitioner's false imprisonment is attributable to "investigative or law enforcement officers," as statutorily defined, the Ninth Circuit should have reversed the district court's dismissal for want of jurisdiction. The circuit court's blatant refusal to recognize this statutory exception directly contradicts the clear Congressional intent to hold federal officers accountable for their tortious conduct, and sets a dangerous precedent for injured parties similar to Petitioner.

Respondent does not dispute the fact of Petitioner's false imprisonment. Br. in Opp. 7. Respondent mistakenly attributes Petitioner's false imprisonment, however, to the United States Parole Commission ("Parole Commission"), whose employees do not qualify as "investigative or law enforcement officers" under Section 2680(h). *Id.* at 8-9. The Parole Commission is not the named defendant in this case, though. Instead, Respondent is the United States, an entity which encompasses both the conduct of the Parole Commission, whose agents negligently miscalculated Petitioner's sentence, and the Federal Bureau of Prisons ("BOP"), whose agents aggregated Petitioner's sentences, wrongfully detained Petitioner for an additional 311 days, and ultimately released Petitioner pursuant to a grant of habeas corpus. In contrast to persons employed by the Parole Commission, agents of the BOP *do* qualify as "investigative or law enforcement officers" under Section 2680(h), as they have the power to make arrests. See 18 U.S.C. § 3050.

Respondent fails to acknowledge the BOP's role in Petitioner's false imprisonment. Instead, Respondent simply alleges, without further explanation or analysis, "Petitioner's contention that Erlin was 'incarcerated by officials of the Bureau of Prisons' is beside the point." Br. in Opp. 9. On the contrary, this contention *is* the point: Petitioner is entitled to reversal by this Court because the Ninth Circuit wrongly disregarded the BOP employee's status as "investigative or law enforcement officers" under Section 2680(h).

Respondent further alleges that Petitioner's argument regarding the "investigative or law enforcement officer" exception is newly raised and thus waived. Br. in Opp. 8. This assertion is simply incorrect for two reasons: first, Respondent itself raised this argument in its Motion for Summary Judgment (see Mot. for Summ. J. 9 ("A claim in this case of false imprisonment by the Parole Commission would be barred by 28 U.S.C. § 2680(h) because neither the professional staff of the Parole Commission nor a Regional Commissioner are investigative or law enforcement officers within the meaning of § 2680(h). These persons have no authority to arrest, conduct searches, or seize evidence.")), rendering Petitioner's argument neither new nor untimely; and second, this argument arises out of a motion to dismiss for lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). As both this Court and the Ninth Circuit have held repeatedly, claims involving subject-matter jurisdiction are seldom waived and consequently can be raised at any time. See, e.g., *U.S. v. Cotton*, 535 U.S. 625, 625 (2002); *Shabazz v. Carroll*, 833 F.2d 149, 149 (9th Cir. 1987); *Vun Cannon v. Breed*, 565 F.2d 1096, 1097 (9th Cir. 1977). Thus, Petitioner's argument is not waived and merits reversal by this Court.

B. Immediate Review Is Warranted To Clarify The Scope Of The Federal Tort Claims Act And Give Effect To Congress' Clear Intent To Hold Law Enforcement Officers Accountable For Their Tortious Conduct

The significant practical and doctrinal implications of the Ninth Circuit decision strongly favor a grant of certiorari. Pet. 11-13. Contrary to the Ninth Circuit's and Respondent's assertion that Petitioner raises questions of first impression (Br. in Opp. 6), circuit courts, including the Ninth Circuit, have previously addressed the issue of federal accountability under the FTCA for false imprisonment, as well as for negligence in arresting and sentencing. See, e.g., *Conlon v. United States*, 474 F.3d 616, 619-20 (9th Cir. 2007) (affirming grant of summary judgment in action against United States for negligently issuing warrant leading to arrest and incarceration); *Santoni v. Potter*, 369 F.3d 594, 603 (1st Cir. 2004) (affirming grant of summary judgment in action against United States for false imprisonment under Section 2680(h)). Consequently, the scope of the decision extends well beyond this case.

As Respondent acknowledges (Br. in Opp. 9 n.4), the courts of appeals have disagreed on the applicability of Section 2680(h) to various tort claims. Compare *Pooler v. United States*, 787 F.2d 868, 872 (3d Cir. 1986) (holding waiver of sovereign immunity "limited to activities in the course of a search, a seizure or an arrest"), with *Sami v. United States*, 617 F.2d 755, 764-65 (D.C. Cir. 1979) (stating in dictum

that law enforcement proviso meant to provide tort remedy for "law enforcement abuses" more broadly). Contrary to Respondent's conclusion, however, this confusion among the circuits regarding the extent of Section 2680(h) provides clear evidence of the need for further clarification by this Court.

The Ninth Circuit's holding in this case is directly at odds with Supreme Court dicta, as well as with the majority of federal court rulings in this area, which have held that Section 2680(h) is to be construed broadly in imposing liability on federal law enforcement officers for tortious conduct. See, e.g., *Ortiz v. Pearson*, 88 F. Supp. 2d 151, 164-65 (S.D.N.Y. 2000); *Employers Ins. of Wausau v. United States*, 815 F. Supp. 255 (N.D.Ill. 1993); *Harris v. United States*, 677 F. Supp. 403, 405 (W.D.N.C. 1988); *Crow v. United States*, 659 F. Supp. 556, 570-71 (D. Kan. 1987). In *Dolan v. United States Postal Service*, 546 U.S. 481, 491-92 (2006), this Court warned against the "unduly generous interpretations of the exceptions" to the FTCA, because such interpretations "run the risk of defeating the central purpose of that statute." The Ninth Circuit's opinion in the present case gives an "unduly generous" interpretation of Section 2680(h) inconsistent with statutory, Ninth Circuit, and Supreme Court authority. This interpretation impedes the central purpose of the FTCA, as it denies plaintiffs the ability to recover for torts committed by the United States. Thus, this Court should affirm the approach these courts have taken, in keeping with its own dicta, the plain language of the

statute, and the express legislative intent described in *Sami*, 617 F.2d at 764-65.

The practical problems that will flow from the Ninth Circuit's precedent are neither speculative nor far-fetched. The ramifications of this decision are prevalent not only at an individual level, such as other petitioners who have wrongfully suffered loss of liberty for a year or more due to egregious errors of federal officials, but also on a societal level. The average annual operating cost of incarcerating each State inmate (including facilities operated by the BOP) currently exceeds $20,000. U.S. Dep't of Just., Bureau of Just. Stat. Special Report, State Prison Expenditures, 2001 (June 2004) (reporting that in 2001, average annual operating cost per State inmate was $22,650, or $62.05 per day, and was roughly equivalent for facilities operated by Federal Bureau of Prisons). Such costs are typically borne by the taxpaying public. Furthermore, consider the current disparate circumstances of individuals accused of crimes who are intentionally assaulted by federal law enforcement agents or officers. These individuals have no legal recourse against the federal government for the actions of its agents under Section 2680(h), according to the Third Circuit. These same individuals, however, could seek recovery under Section 2680(h) under the D.C. Circuit's jurisdiction. Because federal liability differs dramatically depending on the jurisdiction in which the tort occurred, review by this Court is necessary to maintain predictability and uniformity in FTCA cases. The issue here accordingly is ripe for review.

C. The Ninth Circuit Erred By Mischaracterizing Petitioner's Negligence Claim, Which Is Wholly Independent Of A False Imprisonment Claim And Is Therefore Permitted Under The Federal Tort Claims Act

In addition to erroneously interpreting the "investigative or law enforcement officer" exception in Section 2680(h), the Ninth Circuit mistakenly barred Petitioner's wholly independent negligence claim. Section 2680(h) clearly permits negligence claims against the United States. Respondent curiously declined to address this issue, opting instead to focus on Petitioner's false imprisonment claim under the "investigative or law enforcement officer" exception. A careful analysis of the statute reveals that Petitioner has stated not only a claim for false imprisonment, *but also* a claim for negligence. Even assuming that the BOP does not qualify as an "investigative or law enforcement officer," Petitioner's contention of negligence against the Parole Commission still stands.

As Respondent has indicated, Parole Commission employees do not have the power to arrest and therefore are not law enforcement officers under Section 2680(h). Br. in Opp. 9. Instead, the government's liability pursuant to the "investigative or law enforcement officer" exception arises from the conduct of the agents of the BOP. In contrast, the Parole Commission's liability to Petitioner stems from its negligence in calculating Petitioner's sentence.

Petitioner's negligence claim against the Parole Commission is wholly independent of the claim for false imprisonment against the BOP. *Senger v. United States*, 103 F.3d 1437, 1441 (9th Cir. 1996) (holding Section 2680(h) does not shield United States from its own "independent negligent acts . . . that are proximate causes of the harm," even when those harms also originate from an excluded intentional tort. As long as negligence claim is based on actions distinct from excluded intentional tort, recovery of all proximately caused damages is allowed under Section 2680(h)). Whereas Petitioner's false imprisonment claim revolves around the fact of his wrongful incarceration by the BOP for an additional 311 days, Petitioner's negligence claim revolves around acts involved in miscalculating his parole period. The evidence illustrating these independent claims is ample. First, the Parole Commission's miscalculation of Petitioner's parole period took place before any actual confinement by the BOP occurred. Second, the Parole Commission and the BOP are comprised of entirely distinct officers, each of whom was independently responsible for the miscalculation and the incarceration, respectively. Finally, the fact of Petitioner's incarceration by the BOP was not a necessary consequence of the Parole Commission's miscalculation. Similarly, it is possible that Petitioner could have suffered the same false imprisonment had the Parole Commission not calculated his sentence negligently.

The Ninth Circuit committed an egregious error by conflating Petitioner's two distinct claims. Although Section 2680(h) allows both claims, Petitioner need only prevail on one. Instead of recognizing the merit of both or either of these claims, however, the Ninth Circuit and Respondent have declined a proper analysis of Section 2680(h), asserting only that "the gravamen of the complaint is a claim for false imprisonment." Pet. App. 8.

Despite its characterization of Petitioner's claim as one for false imprisonment, the Ninth Circuit provided no legal definitional basis for its reasoning. Although Section 2680(h) clearly defines "investigative or law enforcement officers," it leaves open the definition of the various torts listed, including false imprisonment. According to the federal common law definition, which Respondent accepts (Br. in Opp. 7), false imprisonment consists of "confinement *otherwise than by arrest under a valid legal process*." Restatement (Second) of Torts § 35 cmt. a (1965) (emphasis added); see also *United States v. Neustadt*, 366 U.S. 696, 705-06 (1961) (holding excluded torts within 28 U.S.C. Section 2680(h) are defined according to federal law). Under this definition, Petitioner may not even have a claim for false imprisonment. If the BOP incarcerated Petitioner pursuant to a "valid legal process," there is no action for false imprisonment, and Petitioner's claim cannot possibly "arise out of" false imprisonment, as the Ninth Circuit held. Pet. App. 7-8. Instead, what remains is an action for

negligence, which, as mentioned, is clearly permitted under the FTCA. See 28 U.S.C. § 2680(h).

The FTCA holds the federal government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment. 28 U.S.C. §§ 1346(b)(1), 2674; *United States v. Orleans*, 425 U.S. 807, 813 (1976). The liability of the United States is "normally coextensive with that of a private citizen." *Ting v. United States*, 927 F.2d 1504, 1514 (9th Cir. 1991). Where the alleged tortious act is one not performed by private citizens (such as making arrests or computing prisoners' sentences), however, the courts look to the actions of state and municipal employees to determine the government's liability. *Id*; *Aguilar v. United States*, 920 F.2d 1475, 1477-78 (9th Cir. 1990) ("in the special circumstances where a federal actor is a police officer without a private analogue, liability is determined by reference to state liability for government employees."); *Doggett v. United States*, 875 F.2d 684, 689 (9th Cir. 1989). Thus, there need not be a perfect "private party" analogue to the tortious federal conduct. See, e.g., *Indian Towing Co. v. United States*, 350 U.S. 61, 64-69 (1955) (holding provision of FTCA imposing liability in same manner and to same extent as private individual under like circumstances does not exclude liability in performance of activities which private persons do not perform"); *Lozada v. United States*, 974 F.2d 986, 988 (8th Cir. 1992) (holding "'like circumstances' inquiry is not overly stringent" and that "FTCA should be interpreted broadly to

effectuate the legislative aim") (citing *Owen v. United States*, 935 F.2d 734, 737 (5th Cir. 1991); *Starns v. United States*, 923 F.2d 34, 37 (4th Cir. 1991)); *Somerset Seafood Co. v. United States*, 193 F.2d 631, 635 (4th Cir. 1951) (holding liability imposed on United States by FTCA is not conditioned on whether damages arose out of exercise of functions which might be carried on by private individuals, but liability embraces so-called "governmental" functions).

The liability of the United States in an FTCA action is determined under the law of the state where the act or omission occurred. *Richards v. United States*, 369 U.S. 1, 11 (1962); *McGraw v. United States*, 281 F.3d 997, 1003 n.2 (9th Cir. 2002); *Will v. United States*, 60 F.3d 656, 659 (9th Cir. 1995). Because California was the place where "the act or omission occurred," California state law governs the United States' liability in this FTCA action.

In order to state a cause of action for negligence under California law, a plaintiff must show: (1) a legal duty to use due care; (2) a breach of that duty; and (3) that the breach was the proximate or legal cause of the injury. *Ting*, 927 F.2d at 1513. Respondent has previously mischaracterized Petitioner's negligence claim, asserting the Parole Commission owed Petitioner no duty to "deaggregate" his 13-year aggregate sentence. See Mot. for Summ. J. 19-23. The Parole Commission's duty, however, is not so specific. *Alexander v. Perrill*, 916 F.2d 1392, 1399 (9th Cir. 1990) (holding "strict factual similarity is not required in order to find that a right or duty is clearly

established. All that is necessary is that a reasonable person would have known that the right or duty exists"). Instead, the Parole Commission owed Petitioner a more broad duty of due care in computing his sentence. A reasonable Parole Commissioner would have known that he was under a duty to compute prisoners' sentences correctly. Furthermore, it is easily foreseeable that a miscalculation in sentence length could potentially lead to wrongful incarceration. The Parole Commission breached its duty by negligently calculating Petitioner's sentence, resulting in Petitioner's wrongfully extended incarceration by 311 days. This breach directly and proximately caused damages to Petitioner, for which Petitioner is entitled to compensation.

The Ninth Circuit's opinion engages neither the false imprisonment nor negligence analysis that is warranted under Section 2680(h) and thus disregards the clear legislative intent behind the FTCA. If Congress had intended to carve out an exception to the waiver of sovereign immunity for negligence, it could have done so. Instead, it specifically and purposely exempted negligence from the realm of tortious conduct for which federal officials may claim immunity. Although Section 2680(a) excludes tort claims arising from the "exercise or performance or the failure to exercise or perform a discretionary function or duty," the Parole Commission's acts and omissions in this case were not of a discretionary nature. 28 U.S.C. § 2680(a). Instead, calculating parole terms and sentences does not involve any policymaking; it is

strictly a ministerial act. Thus, Petitioner stated a valid negligence claim under Section 2680(h). Because the Ninth Circuit's decision subverts clear legislative intent and creates poor precedent by diminishing federal officials' liability for tortious conduct, further review is necessary.

Petitioner respectfully submits that this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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